IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Statesboro Division

IN RE:	)	Chapter 13 Case
	)	Number 90-60369
MARVIN J. HORNBERGER	)	
	)	
Debtor	)	
	)	FILED
BERTHA V. HORNBERGER	)	at 4 O'clock & 39 min. P.M.
	)	Date: 1-17-92
Plaintiff	)	
	)	
vs.	)	Adversary Proceeding
	)	Number 91-6025
MARVIN J. HORNBERGER	)	
	)	
Defendant	)	

ORDER AND JUDGMENT

Bertha V. Hornberger, plaintiff in this adversary proceeding seeks a determination of nondischargeability of an obligation owed to her by Marvin J. Hornberger, defendant, pursuant to a final judgment of divorce. On May 29, 1990 the parties were divorced. A separation agreement entered into between the parties was incorporated into the terms of the final judgment of divorce and pertinent to this proceeding provided in paragraph 8:

> Pursuant to a temporary order of February 8, 1990, the defendant is to pay the plaintiff wife a total of $1,190.00 in alimony. These

> payments are to be paid in installments of $117.00 on the first and fifteenth of each month with a balloon payment due on the eighth
>
> installment. These payments began in February of 1990. Six payments have been paid to date with a balance of $500.00 due.
>
> The parties agree that the plaintiff wife shall receive as settlement of all her property rights and claims by a payment of $8,000.00. Two Thousand Six Hundred Sixty Six and 66/100 Dollars ($2,666.66) to be paid within forty-five days of the execution of this agreement, $2,666.66 to be paid seventy-five days within execution of the agreement and $2,666.67 to be paid one-hundred five (105) days after execution of this agreement.
>
> The defendant shall pay to the plaintiff's attorney the sum of $350.00 in installments within ninety days of the execution of this agreement.
>
> The defendant husband shall further reimburse the plaintiff wife $426.96 for health insurance premiums plaintiff has previously paid on behalf of the defendant within ninety days of this agreement.

On July 30, 1990 the defendant filed for relief under Chapter 13 title 11 United States Code. The plaintiff filed an unsecured claim in the amount of Eight Thousand Eight Hundred Twelve and 96/100 ($8,812.96) Dollars, which claim has been scheduled for payment pursuant to plan. Additionally, plaintiff's counsel in the divorce proceeding filed a claim for Five Hundred and No/100 ($500.00) Dollars, which claim has also been scheduled for payment in the Chapter 13 case.

On August 27, 1991 the plaintiff filed this adversary

proceeding objecting to the discharge of the debts specified under paragraph 8 of the separation agreement referenced above contending

that the debts are pursuant to 11 U.S.C. §523(a)(5) in the nature of support and do not constitute a property settlement. The parties' testimony as to their intent under paragraph 8 of the separation agreement is in opposite. Plaintiff contends that the lump sum settlement was at least in part satisfaction of her alimony claim and was entirely for her maintenance and support. Defendant contends that he did not and would not have agreed to the payment of any permanent alimony and that the settlement of Eight Thousand and No/100 ($8,000.00) Dollars was in satisfaction of plaintiff's property claims.

> Bankruptcy Code 1328(a) provides in pertinent part:
>
> As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter [13], the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title [11], except any debt-- . . .
>
> (2) of the kind specified in section 523(a)(5) · · ·

Section 523(a)(5) provides in pertinent part:

> A discharge . . . does not discharge an individual debtor from any debt--

> (5) to a spouse, former spouse, . . . for alimony to, maintenance for, or support of such spouse . . ., in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that-
>
> (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or
>
> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support. . . .

The defendant concedes that the obligation to pay the balance of alimony in the amount of Five Hundred and No/100 ($500.00) Dollars the attorney's fees claim are nondischargeable obligations to be paid in full under his Chapter 13 plan. The issue is whether defendant's obligation to pay to plaintiff "as settlement of all her property rights and claims" the sum of Eight Thousand and No/100 ($8,000.00) Dollars and his obligation to reimburse plaintiff Four Hundred Twenty-Six and 96/100 ($426.96) Dollars for health insurance premiums represent a debt to the former spouse for alimony to, maintenance for, or support of such spouse.

In determining whether a particular debt falls within one of the exceptions of 523, the statute should be strictly construed against the objecting creditor and liberally in favor of the debtor.

Any other construction is inconsistent with the liberal spirit in favor of discharge in order to effectuate a fresh start for the debtor that has always pervaded the entire bankruptcy system. Collier on Bankruptcy, ~523.05(A) (L. King 15th ed. 1989); In re: Black, 787 F.2d 503 (10th Cir. 1983). In addition to this strict,

narrow construction given §523, the burden of proof rests with the party opposing dischargeability, to establish by a preponderance of the evidence that the debt in question is nondischargeable. Grogan v. Garner, ___ U.S. ___, 111 S.Ct. 654, 112 L.E. 2d 755 (1991). In determining whether plaintiff has met her burden of proof,

> [t]he language used by Congress in 523(a)(5) requires bankruptcy courts to determine nothing more than whether the support label accurately reflects that the obligation at issue is "actually in the nature of alimony, maintenance, or support." The statutory language suggests a simple inquiry as to whether the obligation can legitimately be characterized as support, that is, whether it is in the nature of support. The language does not suggest a precise inquiry into financial circumstances to determine precise levels of need or support; nor does the statutory language contemplate an ongoing assessment of need as circumstances change.

In re: Harrell, 754 F.2d 902, 906 (11th Cir. 1985).

"'[W]hat constitutes alimony, maintenance, or support will be determined under the bankruptcy laws, not state law."' Harrell, supra, at 905 [quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 364 (1977), reprinted in, 1978 U.S. Code Cong. & Admin. News 5787, 6319].

Whether a debt due a former spouse is actually in the nature of alimony, maintenance, or support is determined by examining the facts and circumstances existing at the time the obligation was created, not at the time the bankruptcy petition. Harrell, supra, at 906; accord Sylvester v. Sylvester, 865 F.2d 1164

(10th Cir. 1989); Forsdick v. Turgeon, 812 F.2d 801 (2nd Cir. 1987); Draper v. Draper, 790 F.2d 52 (8th Cir. 1986); In re: Comer, 27 B.R. 1018, 1020-21 (9th Cir. BAP 1983), aff'd, 723 F.2d 737 (9th Cir. 1984). Contra Long v. Calhoun, 715 F.2d 1103 (6th Cir. 1983). It is the substance of the obligation which is determinative, not the form, characterization, or designation of the obligation under state law. In re: Bedingfield, 42 B.R. 641 (S.D. Ga. 1983) (Edenfield, J.); accord Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984); Williams v. Williams, 703 F.2d 1055, 1057 (8th Cir. 1983); Calhoun, supra, at 1109; Pauley v. Sponge, 661 F.2d 6, 9 (2nd Cir. 1981).

> While it is clear that Congress intended that federal law not state law should control the determination of when a debt is in the nature of alimony or support, it does not necessarily follow that state law must be ignored completely. . . . The point is that bankruptcy courts are not bound by state law where it defines an item as alimony, maintenance or support, as they are not bound to accept the characterization of an award as support or maintenance which is contained in the decree itself.

Bedingfield, supra, at 645-46 (citation omitted). Accord Sponge,

supra at 9.

In applying bankruptcy law to a determination of whether a provision of final decree of divorce is in the nature of support where, such as in this case, the final decree of divorce incorporates an agreement of the parties, the intention of the parties" ascertained with reference to state law does not violate

the clear mandate that bankruptcy law, not state law, controls. In re: Holt, 40 B.R. 1009, 1011 (D. S.D. Ga. 1984) (Bowen, J.). In addition to state law factors used in determining alimony federal courts employ a number of other factors to determine whether an obligation is actually in the nature of alimony, maintenance, or support. These factors include:

1. The financial circumstances of the parties at the time of the divorce. If the circumstances indicate that the recipient spouse under the agreement or decree needs the award for basic support, regardless of the characterization, the award, though in the nature of property, is more in the nature of support, than a division of property. Shaver, supra, at 1316.

2. "[T]he presence of minor children and an imbalance in the relative income of the parties" at the time of the divorce suggests an intention to create a support obligation. Id. [citing In re: Woods, 561 F.2d 27, 30 (7th Cir. 1977)].

3. An ongoing obligation which terminates on the death or remarriage of the recipient spouse in applying state law

indicates a support, rather than property settlement obligation. Sylvester, supra, at 1166. Conversely, an obligation surviving the death or remarriage of the recipient spouse clearly supports an intention to divide property, not create a support obligation. Adler v. Nicholas, 381 F.2d 168 (5th Cir. 1967).

4. To constitute support a payment provision must not be

manifestly unreasonable under traditional concepts of support, taking into account all of the provisions of the decree. See In re: Brown, 74 B.R. 968 (Bankr. D. Conn. 1987).

5. Finally, where the obligation at issue is contained in a voluntarily executed settlement agreement, determination that the obligation is actually in the nature of support requires a determination that the parties mutually intended to have such obligation considered as support at the time the agreement was executed. Absent a showing of ambiguity, mutual mistake, or fraud, such intent, taking into consideration the foregoing other factors can be determined from the plain language of the agreement. Where the language used is unambiguous, the parties are presumed to have meant what they said. I must simply start with the agreement.

In this case I find the testimony of the parties to be equally credible as to their intention at the time the agreement was executed and made a part of the final judgment of

divorce. Plaintiff considered the obligation to pay her Eight Thousand and No/100 ($8,000.00) Dollars to be for her support and maintenance. Defendant testified that he did not and would not agree to pay any support to plaintiff. Having heard the testimony and observed the demeanor of the witnesses, and construing the separation agreement in its entirety under applicable state and bankruptcy law, plaintiff has failed to carry her burden of proof to establish that the obligation to pay Eight Thousand and No/100 ($8,000.00) Dollars and

to reimburse her Four Hundred Twenty-Six and 96/100 ($426.96) Dollars for health insurance premiums paid by her on behalf of the defendant to be in the nature of support for her; and therefore nondischargeable in defendant's underlying Chapter 7 bankruptcy proceeding. The language of the settlement agreement incorporated in the final decree of divorce is unambiguous: "The parties agree that the plaintiff wife shall receive as settlement of all her property rights and claims by payment of $8,000.00." (emphasis added). Additionally, defendant was required to "reimburse the plaintiff wife $426.96 for health insurance premiums plaintiff has previously paid on behalf of the defendant . . . ." The plain terms of the agreement recite a property settlement, the Eight Thousand and No/100 ($8,000.00) Dollars, and payment of a debt, Four Hundred Twenty-Six and 96/100 ($426.96) Dollars health insurance premium. Additionally, the financial circumstances of the parties at the time of the divorce were relatively equal.

There were no minor children present in the household requiring support. Both parties were employed and are on relatively equal educational levels. At the time of the entry of the agreement, the recipient spouse was employed and appeared to be capable of maintaining and supporting herself. The terms of the agreement strongly support a determination of dischargeability as a property settlement obligation. Additionally, there were no circumstances surrounding the execution of the agreement to mitigate against that strong

indication. The clear language of the agreement should control.

Plaintiff having failed to carry her burden of proof to establish the obligation of defendant to pay to her the sum of Eight Thousand and No/100 ($8,000.00) Dollars in satisfaction of all her "property rights and claims" and to "reimburse [her] $426.96 for health insurance premiums . . . paid on behalf of defendant" were in the nature of support, judgment is ORDERED entered in favor of defendant, Marvin J. Hornberger and against plaintiff Bertha V. Hornberger. No monetary damages are award

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 17th day of January, 1992.